

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
BROWARD DIVISION

IN RE:

CASE NO. 04-25167-BKC-RBR

JOEL BERG

CHAPTER 13

Debtor.

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ORDER DISMISSING CHAPTER 13 PROCEEDING

THIS MATTER came before the Court on October 19, 2004, on Creditor TL Dallas (Special Risks) Limited's, "TLD", Motion to Dismiss (C.P. 10). The basis for the motion to dismiss is that the Chapter 13 filing and plan were not proposed in good faith and were done solely to preclude a trial on the objection to discharge in the Debtor's Chapter 7 proceeding currently pending in case no. 2004-2102-BKC-PGH-A.

I. FACTS

The Debtor filed a Chapter 7 proceeding on December 30, 2003. The Debtor scheduled assets of \$17,660.00 and unsecured liabilities of \$80,838.62. Creditor TLD was listed as an unsecured creditor, disputed and contingent in an unascertained amount. TLD filed an objection to discharge of their debt in the amount of \$213,109.00. In this adversary proceeding TLD claimed the debt owed to it was nondischargeable pursuant to 11 USC §523(a)(2)(A) and §523(a)(6).

Thereafter the Debtor received his discharge on May 13, 2004, excepting the pending adversary of TDL. The adversary was scheduled for pretrial at which time Judge Hyman was to set the matter for trial.

On August 16, 2004, the Debtor filed this Chapter 13 proceeding. The Debtor scheduled only one creditor, TLD, in the amount of \$213,109.00. The Debtor did not list this debt as contingent, unliquidated or disputed. The Chapter 13 plan seeks to pay \$280.00 per month for 36 months or \$10,080.00. Creditor TLD has objected to the Chapter 13 Plan and filed a Motion to Dismiss. The Debtor concedes that the Chapter 13 was filed for the sole purpose of avoiding the trial on the objection to discharge in the underlying Chapter 7 proceeding.¹

This case is a "Chapter 20," a Chapter 7 followed by a Chapter 13 hence "Chapter 20," whereby the Debtor seeks to take advantage of both Chapter 7 and Chapter 13 without accepting the duties and responsibilities of each Chapter. The Chapter 7 bankruptcy provided for the discharge of all the Debtor's unsecured debt, but TLD. This Chapter 7 discharge now makes the Debtor eligible to file a Chapter 13. The Chapter 13 deprives TLD of its right to pursue the Debtor on the objection to discharge in the Chapter 7 and subjects TLD to the "super discharge" in the Chapter 13.

¹ The Debtor would have been ineligible to be a Debtor under Chapter 13 without the Chapter 7 discharge of the \$80,838.62 in unsecured debt. See 11 USC §109(e).

II. CONCLUSIONS OF LAW

The confirmation of a Chapter 13 Plan demands that the plan meet the requirements of 11 U.S.C. § 1325. Pursuant to subsection (a)(3) of 1325, to be entitled to confirmation, a Chapter 13 Plan must have been proposed in "good faith" and may not have been proposed by any other means forbidden by law.

The good faith requirement is "'one of the central, perhaps the most important confirmation finding to be made by the court in any Chapter 13 case.'" *In re Smith*, 848 F.2d 813, 817 (7th Cir. 1988) (quoting *In re Rimgale*, 669 F.2d 426, 427 (7th Cir. 1982)).

The burden of proof to establish that a plan is proposed in good faith is on the debtor. See *In re Clements*, 185 B.R. 903, 906 (Bankr. M.D. Fla. 1995); *In re Smith*, 39 B.R. 57, 58 (Bankr. S.D. Fla. 1984). A debtor's burden increases if a Chapter 13 "super discharge" is sought. See *In re Haskell*, 252 B.R. 236, 242 (Bankr. M.D. Fla. 2000); *In re Wall*, 52 B.R. 613, 616 (Bankr. M.D. Fla. 1985).

Furthermore, the good faith scrutiny that the "super discharge" brings, takes on greater significance in the context of a "Chapter 20" filing. See *In re Sunderland*, 157 B.R. 39, (Bankr. M.D. Fla. 1993). Additionally, "a "chapter 20" ordinarily ought not be permitted when the debtor improperly seeks to accomplish indirectly through sequential filings, first under chapter 7 and then chapter 13, that which he cannot achieve directly under either chapter." *In re Taylor*, 261 B.R. 877, 884 (Bankr. E.D. Va. 2001).

In adducing whether a debtor has proposed a plan in good faith, courts in this circuit apply a "totality of circumstances" test. See *In re Haskell*, 252 B.R. at 242. The Eleventh Circuit, in the case of *In re Kitchens*, 702 F.2d 885 (11th Cir. 1983), set forth the following eleven factors that courts should consider in determining a debtor's good faith under 11 U.S.C. § 1325, including: (1) amount of debtor's income from all sources; (2) living expenses of debtor and his dependents; (3) amount of attorney fees; (4) probable or expected duration of debtor's Chapter 13 plan; (5) motivations of debtor and his sincerity in seeking relief under provisions of Chapter 13; (6) debtor's degree of effort; (7) debtor's ability to earn and likelihood of fluctuation in his earnings; (8) special circumstances such as inordinate medical expense; (9) frequency with which debtor has sought relief under Bankruptcy Reform Act and its predecessors; (10) circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors; and (11) burden which plan's administration would place on trustee. See *id.* at 888-89.

While no one factor is dispositive, the Eleventh Circuit has specifically stated that the bankruptcy court should consider "the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13." *Id.* at 889. See also *In re Wall*, 52 B.R. at 616 (stating that the Chapter 13 "good faith" requirement contemplates a "'broad judicial inquiry into the

conduct and state of mind of the debtor in proposing the plan'") (citation omitted).

When assessing "good faith," courts have considered evidence that the debtor is abusing the judicial process or whether the petition was filed as a litigation tactic. See *In re Bandini*, 165 B.R. 317, 320, (Bankr. S.D. Fla. 1994) (Chapter 13 petition dismissed as bad faith filing where debtor sought to circumvent final judgment of family court); *In re Moog*, 159 B.R. 357, 361, (Bankr. S.D. Fla. 1993) (Chapter 11 petition was filed as "litigation tactic" to evade New York State Court's efforts to enforce divorce decree).

Looking at the facts of this matter as a whole, the Court concludes that Debtor has not sustained his burden of showing that the Chapter 13 Plan was proposed in good faith. The Debtor acknowledges that the Chapter 13 was filed with the intention to avoid the trial on the objection to discharge in the underlying Chapter 7 proceeding. The Debtor was ineligible to be a Debtor under Chapter 13 without the Chapter 7 discharge of the \$80,838.62 in unsecured debt. It is clear to this Court that the Debtor sought to accomplish indirectly through sequential filings, first under chapter 7 and then chapter 13, that which he could not achieve directly under either chapter.

The bankruptcy process is a necessary safeguard in an economic system which is based upon credit transactions. The system spreads among credit extenders the costs of inevitable failures and provides periodic fresh starts for honest, but unfortunate, debtors. However, that system imposes responsibilities on debtors as well as

granting benefits. If the benefits of Chapter 13 are desired, then the concomitant burdens must be assumed. Selecting only the benefits of two different chapters without assuming the burdens of those choices appears to this Court to raise serious questions of good faith.

In re Sunderland, 157 B.R. at 42 (quoting *In re Caldwell*, 151 Bankr. 131 (Bankr. S.D. Ohio 1992)).

Therefore it is hereby

ORDERED that Creditor TL Dallas (Special Risks) Limited's Motion to Dismiss (C.P. 10) is **GRANTED**.

DONE AND ORDERED in the Southern District of Florida on October 29, 2004.

RAYMOND B. RAY, JUDGE
UNITED STATES BANKRUPTCY COURT